No. 08-573

Supreme Court, U.S.
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In The Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,

Petitioner,

v.

MICHIGAN PUBLIC SERVICE COMMISSION AND THE DETROIT EDISON COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Michigan law requires that electric utilities, such as Respondent The Detroit Edison Company (Edison), file annual Power Supply Cost Recovery (PSCR) cases before the Michigan Public Service Commission (MPSC or Commission). Michigan law also allows an electric utility's PSCR case to be combined with its retail electric rate case, which is what happened below. In a PSCR case, the MPSC approves the utility's recovery from utility customers of the utility's reasonable and prudent costs for purchasing and generating electricity. One of Edison's costs was its payment of spent nuclear fuel (SNF) fees to the Department of Energy (DOE) for the disposal of SNF from its nuclear plant.

Against this backdrop, the question presented is:

Whether the MPSC's opinion and order allowing Edison to recover its SNF fee costs under Michigan's PSCR law, and the Michigan Court of Appeals' opinion affirming the MPSC's opinion based on state-law grounds recently recited by that Court in *In re Application of Indiana Michigan Power Co.*, 275 Mich. App. 369; 738 N.W.2d 289 (2007), without reaching Petitioner's federal preemption argument,

COUNTER-STATEMENT OF QUESTION PRESENTED – Continued

presents a question of federal preemption such that this Court should grant the petition for a writ of certiorari.[1]

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[1] On November 3, 2008, this Court denied Petitioner's petition for writ of certiorari in Supreme Court Docket No. 08-246, where Petitioner presented the exact same preemption question regarding *In re Application of Indiana Michigan Power Co., supra*, that Petitioner presents here (compare page ii of the Petitions in Docket Nos. 08-246 and 08-573).

RULE 29.6 DISCLOSURE STATEMENT

The Detroit Edison Company is wholly-owned by DTE Energy Company. DTE Energy Company's stock is publicly-traded.

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INTRODUCTION

The Petition presents no sound basis for this Court to exercise jurisdiction. The Michigan Public Service Commission (MPSC or Commission) has repeatedly heard Petitioner's arguments about various electric utilities, including Respondent The Detroit Edison Company (Edison), paying spent nuclear fuel (SNF) fees to the Department of Energy (DOE). Based on the record in this state-law utility cost-recovery case, the MPSC found "that Detroit Edison has provided sufficient basis upon which to find that it has reasonably and prudently incurred its SNF costs and [Petitioner] has not successfully demonstrated otherwise." (24a).

The Michigan Court of Appeals has also repeatedly heard Petitioner's arguments challenging MPSC decisions finding that Petitioner failed to prove that electric utilities unreasonably or imprudently paid SNF fees to the DOE. In this case, the Court simply followed the Michigan Court Rules and its own recent state-law decision in *In re Application of Indiana Michigan Power Co.*, 275 Mich. App. 369; 738 N.W.2d 289 (2007), where the Court expressly declined to reach Petitioner's preemption arguments because the MPSC did not rely on federal preemption (192a, n. 5). On November 3, 2008, this Court denied Petitioner's petition for writ of certiorari regarding *In re Indiana Michigan Power Co.*, where Petitioner presented the exact same purported federal preemption question that Petitioner presents here (*see* page ii of the Petitions here and in Docket No. 08-246). Thus, this case

does not present any viable federal preemption question – let alone an important one that would merit this Court's review.

Petitioner mischaracterizes the MPSC and Michigan Court of Appeals' decisions in an effort to self-create a federal preemption question, irrespective of what the MPSC and Michigan Court of Appeals actually decided. Petitioner essentially, and erroneously, contends that: (1) the MPSC and Michigan Court of Appeals' decisions contradict decisions of this Court and other federal courts by erroneously holding that the SNF fee is mandated by 42 U.S.C. §10222, and disregarding the reciprocal obligation between payment of the fee in exchange for the DOE commencing disposal of SNF by January 31, 1998; (2) because the DOE has breached its SNF disposal obligation, utilities are no longer obligated to pay the SNF fee, so the MPSC should have found that Edison unreasonably and imprudently continued to pay the fee; (3) the MPSC and Court of Appeals found that federal law preempted the disallowance of cost recovery and other "remedies" Petitioner sought; and (4) these supposed errors regarding federal preemption have significant national importance and have improperly constrained the MPSC's ratemaking authority.

An accurate review of this case demonstrates that there is no question of federal preemption that is appropriately presented for review by this Court. The MPSC and Michigan Court of Appeals properly decided this case based on the evidentiary record and

state law. The MPSC did indicate that it agreed with a lengthy discussion by the Administrative Law Judge (ALJ) who presided over this case, which discussion included one sentence referring to preemption, but there is no merit in Petitioner's attempt to read those statements out of context (24a, 39a-44a). Those statements are part of the ALJ's recommendation to the MPSC, and the MPSC's decision finding that Edison reasonably and prudently paid the SNF fee, and therefore could recover those costs under Michigan law, in light of the risks and consequences that Edison would face (such as the loss of its license to operate its nuclear plant) if it were to stop paying the SNF fee based on Petitioner's legal theory that Edison does not really have to pay the fee.

The Court of Appeals appropriately affirmed the MPSC because a published decision of the Court of Appeals is binding precedent under the Michigan Court Rules. The Court had just rejected all of Petitioner's SNF arguments in *In re Application of Indiana Michigan Power Co., supra,* where the Court recognized that the MPSC did not decide a question of federal preemption, and similarly declined to decide it (192a, n. 5: "Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption").

Petitioner's claim that this case has national significance is misguided, particularly since Petitioner attempts to support its claim with misstatements

regarding the record and the decisions below. The Petition arises from a Michigan PSCR plan case, where the key issue is whether the utility's PSCR plan is reasonable and prudent. Based on a full and complete evidentiary record, the MPSC determined that "Detroit Edison has provided sufficient basis upon which to find that it has reasonably and prudently incurred its SNF costs, and [Petitioner] has not successfully demonstrated otherwise." (24a). Petitioner merely wishes to substitute its judgment concerning what is "reasonable and prudent" for that of the MPSC – essentially that Edison should stop paying the SNF fee based on Petitioner's legal theory, instead of paying the fee and thereby avoiding the risks of severe consequences, as demonstrated on the record.

The MPSC properly decided this case, and the Michigan Court of Appeals properly affirmed the MPSC's decision based on Michigan law. There is no significant public interest issue at stake here, and any claimed confusion and uncertainty in the decisions below arise from Petitioner's own misstatements.

None of the criteria warranting this Court's review are present, so the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

I. BACKGROUND AND SUMMARY OF THE DECISIONS BELOW.

The Detroit Edison Company (Edison) is an electric utility that owns and operates the Fermi 2 nuclear generating plant, which supplies electricity to Michigan customers. Edison pays Nuclear Waste Fund fees for Spent Nuclear Fuel (SNF) to the Department of Energy (DOE) pursuant to 42 U.S.C. §10222(a)(2). (64a). The federal SNF disposal program did not begin as scheduled (January 31, 1998), but the DOE maintains that it will begin eventually.

Michigan law authorizes the Michigan Public Service Commission (MPSC or Commission) to include a Power Supply Cost Recovery (PSCR) clause in an electric utility's rate schedule. 1982 P.A. 304 ("Act 304"). A PSCR clause allows a utility to charge its retail customers for the anticipated costs associated with generating and purchasing electricity, and requires electric utilities such as Edison file annual plans for approval by the MPSC.[2] SNF fees are costs

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[2] Act 304 relevantly provides:

"(1) As used in this act:

"(a) 'Power supply cost recovery clause' means a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the

(Continued on following page)

that result from the disposal of nuclear fuel rods that have been used to generate electricity. Thus, for purposes of ratemaking in Michigan, Edison's SNF fee is classified as a nuclear fuel expense, and is included as a power supply cost reflected in Edison's PSCR plan. The Petition arises from the MPSC's approval of Edison's 2004 PSCR plan, which the Michigan Court of Appeals affirmed.

More specifically, the Petition arises from MPSC Case No. U-13808, which was a combined PSCR/general rate case for Edison.[3] The Michigan Environmental Council (Petitioner) (together with the Public Interest Research Group in Michigan (PIRGIM)) intervened

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booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.

"(b) 'Power supply cost recovery factor' means that element of the rates to be charged for electric service to reflect power supply costs incurred by an electric utility and made pursuant to a power supply cost recovery clause incorporated in the rates or rate schedule of an electric utility." M.C.L. 460.6j(1)(a) and (b). (123a-124a).

[3] Petitioner also refers to a number of other cases, which are irrelevant because Petitioner does not seek review of those cases (other than *In re Application of Indiana Michigan Power Co.* in Docket No. 08-246, where this Court has denied review). Petitioner's description of those cases is also misleading because it is inaccurate and incomplete. Notwithstanding Supreme Court Rule 15.2, Edison declines to burden the Court with a lengthy recitation of corrections to Petitioner's countless (and ultimately irrelevant) misstatements about other decisions, which speak for themselves and reveal Petitioner's inaccuracies.

and challenged Edison's recovery of the SNF fee that Edison pays to the DOE. Petitioner further advocated the imposition of new financial and reporting requirements on Edison for the disposal of SNF (Tr 2484-2507).[4] Edison witness Colonnello responded with several reasons why Petitioner's proposals lacked merit (Tr 2629-41).

The Administrative Law Judge (ALJ) who presided over the proceedings recommended that the MPSC reject Petitioner's arguments, in accordance with the MPSC's previous decisions, which had been affirmed by the Michigan Court of Appeals. (39a-44a, citing *Michigan Environmental Council v. Public Service Comm., unpublished opinion per curiam of the Court of Appeals, decided December 9, 2003* (Docket Nos. 240403 and 240406), *lv. den.*, 471 Mich. 870 (2004) (Appendix T in Supreme Court Docket No. 08-246, 348a-357a, affirming the MPSC in MPSC Case Nos. U-12613 and U-12615).

The Commission agreed, and recognized that it had repeatedly rejected Petitioner's identical arguments in prior cases:

> "MEC/PIRGIM maintains that the ALJ erroneously endorsed the position taken by Detroit Edison regarding the issue of spent nuclear fuel (SNF) fees by finding that the

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[4] Unless otherwise indicated, "Tr [page number]" refers to the lengthy record in Case No. U-13808, which is available on the MPSC's website.

> matter should not be considered in this proceeding.
>
> "The Commission finds that the ALJ cannot be faulted for his recommendation. On several prior occasions, the Commission has addressed related issues. *See*, the November 20, 2001 order in Case No. U-12613. Moreover, the issues raised by MEC/PIRGIM are currently under consideration in a complaint proceeding docketed as Case No. U-13771." (32a).[5]

Petitioner moved for rehearing, which the Commission denied because Petitioner simply repeated its arguments, and the record demonstrated that Edison was reasonable and prudent in paying SNF fees to the DOE:

> "The Commission finds that the petition for rehearing should be denied, as the petition does not meet the standards for granting rehearing. MEC/PIRGIM merely raises again the same arguments that the Commission should involve itself in judging the reasonableness of costs assessed by federal statute. **The Commission finds that Detroit**

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[5] Case No. U-13771 concerned Petitioner's generic complaint against Michigan utilities regarding SNF issues. Petitioner refers to that case, indicating that the ALJ found that the MPSC has authority to adopt its proposed remedies (Petition, p. 30, n. 10). Petitioner neglects to mention that the MPSC later dismissed the complaint, without prejudice, due to Petitioner's failure to even state a *prima facie* case (Appendix X in Supreme Court Docket No. 08-246, at 590a-591a).

Edison has provided sufficient basis upon which to find that it has reasonably and prudently incurred its SNF costs, and MEC/PIRGIM has not successfully demonstrated otherwise.

> "As the Commission intended to convey in its November 23, 2004 order, it agrees with the discussion and conclusions of the Proposal for Decision at pages 110-113. The Commission is not persuaded that it should reach a different conclusion at this time." (24a, emphasis added).

Petitioner inaccurately asserts: "The MPSC below adopted the ruling of the Administrative Law Judge ("ALJ") in favor of federal preemption" (Petition, p. 3). In reality, as indicated above, the ALJ set forth a detailed recommendation focusing on state law and MPSC precedent as bases for rejecting Petitioner's requested relief (39a-44a), with only one sentence referring generally to preemption (40a, "Finally, the ALJ believes that preemption prevents state intervention into the federally regulated nuclear arena."). The ALJ noted this belief in the context of his lengthy discussion outlining the Petitioner's arguments, and the ALJ recommended that the Commission follow its prior decision in Case No. U-12613, finding that a utility's payment of SNF fees to the DOE is reasonable and prudent, notwithstanding Petitioner's assertion that utilities really do not have to pay those fees (40a-44a).

In agreeing with the ALJ's discussion, the MPSC explained that it found no merit in Petitioner's position that the MPSC should "involve itself in judging the reasonableness of costs assessed by federal statute" (24a). There is no federal preemption issue, since it is undisputed that a federal statute assesses the SNF fee.[6] Even Petitioner's own witness acknowledged that Edison's SNF costs for its nuclear plant included "the federally assessed fee for disposal, which is currently one mill per kilowatt hour" (257a), and that the fee "will continue to be assessed throughout the entire life of the plant." (258a).

Petitioner asserted before the MPSC (and maintains) the theory that Edison does not really have to pay the "federally assessed fee" that is provided by federal statute, and that Petitioner's own witness acknowledged. Edison responded by presenting qualified expert and factual testimony that if Edison did not pay the SNF fee to the DOE, then Edison would risk severe consequences including the loss of its license to operate its nuclear plant. Thus, based on the record, the MPSC found that Petitioner failed to carry its state-law burden of proving that Edison acted unreasonably or imprudently in paying the

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[6] 42 U.S.C. §10222(a)(2) states: "For electricity generated by a civilian nuclear reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) [for standard contracts between nuclear utilities and the DOE] shall be equal to 1.0 mill per kilowatt-hour." (64a).

SNF fee, and the MPSC allowed Edison to recover its costs in its PSCR plan (24a).

Petitioner's discussion of Edison's evidence and briefing is inaccurate and incomplete. It is also misleading because it ignores or mischaracterizes the context. Petitioner intervened in Edison's cost-recovery case, and injected the assertion that Edison could not recover SNF fee costs that it paid. Edison responded with evidence demonstrating that Edison was reasonable and prudent (the state-law standard for cost recovery under Act 304) in paying federal fees rather than risk consequences such as the loss of its license to operate its nuclear generating plant. One of the foundations for Petitioner's legal position was (and is) that the MPSC is not preempted by federal law (*see*, for example, 192a, n. 5). Edison was compelled to address the issues that Petitioner attempted to inject. Ultimately, however, neither the MPSC nor the Michigan Court of Appeals reached the federal preemption issue because state law grounds alone demonstrated (irrespective of federal law) that Edison acted reasonably and prudently, and there was no sound basis for the MPSC to disallow Edison's cost recovery or take Petitioner's other suggested "remedies" against Edison.

The Court of Appeals affirmed the Commission and rejected Petitioner's arguments, following its opinion (authored by the same Judge about 10 weeks earlier) in *In re Application of Indiana Michigan Power Co., supra,* where the Court expressly declined to address federal preemption because the MPSC did

not rely on it (192a, n. 5). Petitioner filed an Application for Leave to Appeal with the Michigan Supreme Court, pressing its erroneous claims concerning federal preemption in this case. The Michigan Supreme Court denied Petitioner's application (45a-51a).

Petitioner filed a petition for writ of certiorari in Supreme Court Docket No. 08-246, where Petitioner presented exactly the same preemption question regarding *In re Application of Indiana Michigan Power Co., supra*, that Petitioner presents here (*see* page ii of the Petitions). Petitioner asked the Court to consider that petition and this one on a consolidated basis (Docket No. 08-573 Petition, p. 3, n. 3). On November 3, 2008, this Court denied the petition in Docket No. 08-246.

REASONS FOR DENYING THE PETITION

I. THE MICHIGAN PUBLIC SERVICE COMMISSION AND MICHIGAN COURT OF APPEALS' DECISIONS ARE BASED ON MICHIGAN LAW AND THE EVIDENTIARY RECORD.

This case does not present an appropriate vehicle to examine the federal preemption question that Petitioner attempts to raise. This case was decided on the basis of Michigan law as applied to the evidentiary record before the MPSC, so there is no sound

basis for this Court to review this case. Supreme Court Rule 10.

The MPSC simply found the SNF fee costs incurred by Edison were reasonable and prudent based on the evidentiary record, applying the state-law reasonable and prudent standard for utility cost recovery under Michigan's Act 304. The Michigan Court of Appeals simply followed its prior published state-law decision in *In re Application of Indiana Michigan Power Co., supra*, which the Court was required to follow under the Michigan Court Rules, M.C.R. 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis") and M.C.R. 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.") (176a-177a).

In *In re Application of Indiana Michigan Power Co.*, the Court of Appeals explained that the MPSC had the discretion (under well-established Michigan law) to weigh the evidence presented on the record, and that Petitioner failed to establish that the utility was unreasonable or imprudent in paying SNF fees to the DOE:

> "IMPCo presented evidence that payment of the SNF fees was mandated by federal law and its standard contract with the DOE, and

> that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. **The PSC was entitled to rely on the evidence presented by IMPCo on this issue, rather than the evidence presented by appellants.** *Great Lakes Steel Div. of Nat'l Steel Corp. v. Pub. Service Comm.*, 130 Mich. App. 470, 481; 344 N.W.2d 321 (1983). **Moreover, the PSC concluded that, in the absence of evidence that IMPCo acted unreasonably and imprudently with regard to the collection of SNF costs, it had no authority to impose additional remedies such as those suggested by appellants. Appellants point to no statute or caselaw that holds to the contrary.**
>
> "The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular in its order denying appellants' petition for rehearing. Appellants' argument that the PSC's decision is unlawful and unreasonable because it does not comply with Const. 1963, art. 6, § 28 and M.C.L. 24.285 is unsubstantiated." (188a-189a, emphasis added).

The Court of Appeals in *In re Application of Indiana Michigan Power Co., supra*, expressly declined to address Petitioner's preemption argument:

> "Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. **We need not consider this**

> **argument because the PSC did not rely on the doctrine of federal preemption.** Moreover, a state utility commission must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute, *ABATE v. Public Service Comm.*, 192 Mich. App. 19, 22-27; 480 N.W.2d 585 (1981), and, SNF fees paid by IMPCo are mandated by statute, 42 U.S.C. §10222(a)(2)." (192a, n. 5, emphasis added).[7]

Therefore, the Court of Appeals did not reach any preemption issue in this case (or in *In re Application of Indiana Michigan Power Co.*), and did not implicate any of the federal preemption cases cited by Petitioner. As noted above, the Court of Appeals did not find the MPSC's ratemaking authority constrained by federal law. Instead, the Court of Appeals properly applied the Michigan Court Rules (relevantly quoted above) and Michigan's statutory standard of review under M.C.L. 462.26, which requires the appealing party to show by clear and satisfactory evidence that the MPSC order is unlawful or unreasonable.

Petitioner's disregard for Michigan law and what the Michigan Court of Appeals actually decided – and did not decide – underscores the lack of foundation for the federal preemption issue that Petitioner attempts

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[7] The Court's observation in Footnote 5 (192a) is also *dicta* because it addressed a question not necessary to the Court's decision. *See, Murray v. Menzies Real Homes Co.*, 236 Mich. 77; 210 N.W. 217 (1926).

to raise before this Court. Petitioner's assertion that the Court of Appeals improperly applied collateral estoppel (Petition, p. 3) lacks merit under Michigan law, which provides that the Court of Appeals' published opinion in *In re Application of Indiana Michigan Power Co.* was binding precedent here. M.C.R. 7.215(C)(2) and M.C.R. 7.215(J)(1). (176a-177a).[8] Both cases involved this very same Petitioner's challenge, through the same witness, to SNF fee recovery in an electric utility's PSCR plan case. Indiana Michigan Power Company (I&M or IMPCo) and Edison each operate a nuclear power plant. The record in *In re Application of Indiana Michigan Power Co.*, like the record concerning Edison here, reflected that (1) the utility's payment of SNF fees notwithstanding the federal government's delay in completing a SNF disposal site was consistent with the actions of other utilities, (2) if the utility refused to pay the fees, then it risked losing its license to operate its nuclear plant, and (3) the utility supported litigation to compel the federal government to fulfill its duties to accept SNF for disposal. Accordingly, the Court of Appeals affirmed the MPSC's conclusion in both cases that the utility acted reasonably and prudently, and the MPSC's rejection of Petitioner's unfounded remedies.

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[8] Although collateral estoppel does not apply in the pure sense to certain MPSC decisions, it is well established under Michigan law that such decisions do not have to be relitigated. *Pennwalt Corp. v. Public Service Comm.*, 166 Mich. App. 1, 9; 420 N.W.2d 156 (1988).

The MPSC and Court of Appeals' succinct rejections of Petitioner's arguments simply reflect that the Commission and the Court have repeatedly heard, and repeatedly rejected, those arguments. Petitioner's arguments, although lengthy, do not raise any meritorious point. The Commission and Court's decisions are soundly based on Michigan law (which allows Edison's recovery of costs that it reasonably and prudently incurs) and the record (which demonstrates that Edison acted reasonably and prudently).

Even apart from *In re Application of Indiana Michigan Power Co., supra*, the controlling law and record demonstrate that the Commission and Michigan Court of Appeals properly rejected Petitioner's arguments. Edison pays Nuclear Waste Fund fees to the DOE pursuant to 42 U.S.C. §10222(a)(2). (64a). The DOE has been delayed in building a SNF repository. Based on Petitioner's speculation about the DOE's future conduct, Petitioner challenged Edison's ability to continue to recover the SNF fees in its rates, and further advocated the imposition of new financial and reporting requirements on Edison for the disposal of SNF. The Commission has repeatedly rejected Petitioner's arguments in past cases, and Petitioner's continuing dispute of previously-established matters did not provide any basis for the Commission to change its position. *See, Michigan Environmental Council v. Public Service Comm., unpublished opinion per curiam of the Court of Appeals, decided May 11, 2004* (Docket Nos. 244354 and 246744), *lv. den.*, 471 Mich. 870 (2004) (Appendix U

in Supreme Court Docket No. 08-246, 365a, affirming the MPSC in MPSC Case No. U-12275, and explaining: "No statute authorizes the PSC to take action such as that suggested by MEC and PIRGIM in either a general rate case or a PSCR proceeding absent a finding of unreasonable or imprudent action by a utility").

Petitioner's arguments are based on the premise that Edison does not have to pay SNF fees, even though 42 U.S.C. §10222(a)(2) provides that Edison must pay a 1.0 mill per kilowatt hour (kWh) fee on net electricity generated and sold by its Fermi 2 nuclear plant (64a), as Petitioner's own witness acknowledged on this record (257a-258a). The Nuclear Waste Policy Act of 1982 (NWPA) directs the DOE to dispose of SNF. 42 U.S.C. §10131(a)(4) ("Federal government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of . . . ") (60a).[9] The NWPA assigned to the DOE the

[9] The NWPA represents a "comprehensive scheme" for the disposal of SNF and establishes specific duties and responsibilities for the federal government, the States and the civilian nuclear power industry. *General Electric v. Dep't of Energy*, 764 F.2d 896, 898 (DC Cir. 1985). Under the NWPA, the federal government has the express responsibility for the long-term storage and permanent disposal of SNF and high-level nuclear waste (42 U.S.C. §10143), the process of siting storage and disposal facilities for nuclear waste (42 U.S.C. §10121-10175) and the Nuclear Waste Fund to pay for these activities. 42 U.S.C. §10222.

(Continued on following page)

responsibility for building and placing into operation a permanent geologic repository for commercially-generated SNF. The record further demonstrates that there is no merit in Petitioner's proposal that the Commission should hold Edison responsible in the event the DOE does not construct the contemplated

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The NWPA requires civilian nuclear power generators to contract to pay the U.S. Treasury 1 mill/kWh on net electricity generated and sold from nuclear generating plants. As conditions for federal acceptance of SNF and the avoidance of any further financial obligation for long-term storage and disposal, nuclear power generators must pay the 1 mill/kWh SNF disposal surcharge and execute the DOE contract. 42 U.S.C. §10222(a)(2). (64a). The NWPA further directs the Nuclear Regulatory Commission to require that its nuclear power licensees enter into the DOE contract. The law also directs the DOE not to accept SNF unless the fuel owner is under contract with DOE. 42 U.S.C. §10222(b). (67a).

Accordingly, Edison maintains a contract with the DOE and pays SNF fees. Nuclear utilities must hold a Standard Contract as a condition of maintaining their operating licenses. 42 U.S.C. §§10222(a) and (b). *See also, Roedler v. Dep't of Energy*, 255 F.3d 1347, 1350 (Fed. Cir. 2001) (the utility "has paid and apparently continues to pay the [Nuclear Waste] fee, as a condition of the continuing operation of its nuclear-fueled electricity generating facilities.").

The NWPA states "For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee [to offset the costs of disposal of high level radioactive waste and spent nuclear fuel] shall be equal to 1.0 mill per kilowatt-hour." 42 U.S.C. §10222(a)(2). (64a). The Standard Contract is the mechanism for collecting this fee, but the NWPA indicates that the fee must be paid even in the absence of such a contract. *See*, 42 U.S.C. §10222(a)(3) (stating that the fee was retroactive prior to the initiation of the Standard Contracts). (65a).

facility, or in Petitioner's proposal to place SNF fees in escrow (Tr 2498). It is beyond credible dispute that Edison has appropriately maintained its position for the permanent disposal of SNF (instead of risking being "last in line" for disposal), while maintaining its Fermi 2 license to provide electricity to its customers (instead of risking the shut-down of that plant). (Tr 2634).

The record before the MPSC further reflects that Petitioner's suggestion that the DOE might never perform its duties under the Standard Contract is mere speculation (Tr 2502), and that there is no sound basis to believe that the federal government will "permanently fail" to accept SNF for disposal, particularly in light of the federal government's recommendation of the Yucca Mountain Site in 2002, and the importance of SNF disposal to national security (Tr 2634-35). The NRC found in 1990 and reconfirmed in 1999 that there is reasonable assurance that an SNF repository will be developed and operational during the first quarter of this century (Tr 2636-38).

The MPSC and Court of Appeals correctly applied Michigan law in light of a full and clear evidentiary record. None of these decisions required a finding that the MPSC's ratemaking authority is preempted by federal law. There is no merit in Petitioner's contentions that the decisions are contrary to decisions of this Court, the federal Court of Appeals and lower federal courts, since those contentions are based on Petitioner's misstatements concerning the

decisions and the record below. No further review would be appropriate to decide an academic and undeveloped question that would not alter the outcome of this case because, in any event (even assuming that Petitioner is correct that the MPSC is not preempted by federal law from taking action under Michigan law), there is still no basis for the MPSC to take any action against Edison under Michigan law (setting forth a reasonable and prudent standard for cost recovery) and the evidentiary record (which demonstrates that Edison was reasonable and prudent). Similarly, Petitioner's contention that the nonissue presented has significant national importance likewise affords no basis for this Court to grant the Petition. This is a state-law case that was driven by its facts, so this case would not be an appropriate vehicle to attempt to address a federal preemption issue with regard to SNF fee payments.

II. THE RECORD SUPPORTS THE COMMISSION'S DECISION THAT EDISON REASONABLY AND PRUDENTLY PAID THE SNF FEE, SO EDISON COULD CONTINUE TO RECOVER THAT COST IN ITS RATES UNDER MICHIGAN LAW.

As discussed above, there is no sound basis for this Court to review the preemption question that Petitioner presents. There is no need for further analysis, and the Petition should simply be denied. For the sake of completeness, however, and due to Petitioner's gross mischaracterizations of this case

and the Commission, Edison presents further detail explaining that Petitioner's arguments boil down to a disagreement with facts that have been repeatedly established on the evidentiary records in Commission proceedings. Accordingly, the Commission properly allowed Edison to continue to recover its SNF fees from its retail electric customers through retail electric rates, and the Court of Appeals properly affirmed.

Petitioner mischaracterizes Edison's evidentiary presentation, and suggests that Edison should have offered more proof (*e.g.*, Petition, p. 15). To the contrary, the record fully demonstrates, and it is beyond credible dispute, that Edison was reasonable and prudent in paying the SNF fee, instead of risking the loss of its Fermi 2 license. Past proceedings at the Commission had also established Edison's reasonable and prudent actions over the years regarding its SNF costs.

Petitioner ignores that it injected the SNF issues into this case before the MPSC, and that Edison appropriately responded to them. Petitioner failed to carry its burden to (1) allege *specific* unreasonable and imprudent conduct, and (2) establish that claim before the Commission. A utility's expenses must be presumed reasonable and prudent, absent a clear showing of bad faith or abuse of discretion. *Public Utilities Comm. v. Michigan State Tel. Co.*, 228 Mich. 658; 200 N.W. 749 (1924). To attack a utility's expenses, "waste or negligence . . . must be established by evidence." *West Ohio Gas Co. v. Public Utilities*

Comm. of Ohio, 294 U.S. 63, 68; 55 S. Ct. 316; 79 L. Ed. 761, 767 (1934). Further, "good faith is to be presumed on the part of the managers of a [utility]." 294 U.S. at 72; 79 L. Ed. at 769.[10]

There is no merit in Petitioner's suggestion that the Commission failed to carry out its duties, and Petitioner's citation of *Detroit v. Public Service Comm.*, 308 Mich. 706; 14 N.W.2d 784 (1944) to support that assertion is misplaced (Petition, p. 25). In *Michigan Environmental Council, supra*, (Appendix U in Supreme Court Docket No. 08-246), the Michigan Court of Appeals held that the Commission "acted in accordance with the authority granted to it" (Docket No. 08-246, 366a, citing *Detroit, supra*). *See also, Union Carbide Corp. v. Public Service Comm.*,

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[10] This Court has long honored the principle that utility costs are presumed to be reasonable and prudent. In *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm. of Missouri*, 262 U.S. 276, 288-289; 43 S. Ct. 544; 67 L. Ed. 981, 985 (1922), the Court explained:

> "[W]hile the state may regulate, with a view to enforcing reasonable rates and charges, . . . 'it is not empowered to substitute its judgment for that of the [utility]; *nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the [utility].*'" (Emphasis added).

The Michigan Supreme Court reiterated this same principle in *Union Carbide Corp. v. Public Service Comm.*, 431 Mich. 135, 148; 428 N.W.2d 322 (1988). *Also see Ohio Power Co. v. FERC*, 880 F.2d 1400, 1413 (DC Cir. 1989) (Mikva, J., concurring) ("[I]t has been long-settled that a utility's costs are presumed [subject to rebuttal] to be prudently incurred.")

431 Mich. 135, 148; 428 N.W.2d 322 (1988) (discussing the Commission's statutory authority and rejecting an overbroad reading of *Detroit, supra*). Thus, there is absolutely no basis for Petitioner to criticize the Commission for an alleged lack of action. Instead, there is a lack of merit and relevance in Petitioner's arguments.[11]

The record before the MPSC demonstrates that Petitioner failed to prove that Edison's response has been materially different than the responses of numerous other utilities, and Petitioner presented no credible criticism of the way Edison has managed its SNF costs (Tr 2631). Petitioner failed to carry its burden of pleading and proof, just as it has repeatedly failed in the past. As the Commission was well aware, SNF disposal is a national issue, which is far bigger than Edison and beyond Edison's control. *See generally,* 42 U.S.C. §10131(a)(2). (60a). Thus, the Commission appropriately found that "Detroit Edison has provided sufficient basis upon which to find that it has reasonably and prudently incurred its SNF costs, and MEC/PIRGIM has not successfully demonstrated otherwise" (24a).

On this record before the MPSC, Edison witness Colonnello further testified that Edison has been

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[11] Petitioner largely ignores the record, and mischaracterizes the decisions below, in favor of a 37-page Petition that consists largely of hyperbole, and which cobbles together and reprints various arguments, many of which do not have any connection to this case.

reasonable and prudent with respect to actions and associated costs for storing SNF at the Fermi 2 plant. Edison has also taken actions to protect its rights under the Standard Contract with the DOE, and to protect itself and its customers regarding the DOE's delays (Tr 2631).

In 1994, Edison anticipated the loss of storage capability in the spent fuel pool, and evaluated options for expanding the capacity to store SNF onsite. Edison's current SNF storage strategy provides balance between establishing timely capacity and preserving capital expenditures. Edison's approach is consistent with industry experience, and reasonable and prudent for minimizing the costs of storing SNF onsite (Tr 2631-32).

Edison has also taken ongoing actions for almost a decade to protect itself and its customers regarding the DOE's delays. In September, 1995, Edison and other utilities sued the DOE, arguing that the DOE had a legal responsibility to begin taking SNF by the 1998 Contract date. In January 1997, Edison and 35 other nuclear utilities filed suit to attempt to force the federal government to meet its legal obligation to begin accepting SNF. In December 2002, Edison sued the DOE for damages under the contract associated with the DOE's failure to begin accepting SNF (Tr 2632-33). Edison has also worked over the past 10 years to solicit public and congressional support for legislative efforts to advance the acceptance of SNF. These efforts have successfully contributed to the present progress towards construction of a SNF

repository at Yucca Mountain. These actions by Edison were appropriately responsive, very reasonable, and consistent with the actions of most other U.S. nuclear utilities (Tr 2633-34).[12]

Edison was also involved in key SNF litigation, including *Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272 (DC Cir. 1996) and *Northern States Power Co. v. Dep't of Energy*, 128 F.3d 754 (DC Cir. 1997), where the public service commissions of many states and many utility companies joined forces to seek relief from the DOE's progress in dealing with

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[12] Similarly, in MPSC Case No. U-12121 (referenced at 260a), where Petitioner was a party, Edison witness Dr. Hsieh explained, through cross examination elicited by Petitioner, that Edison has joined in filing several legal actions attempting to assist and/or require the DOE to discharge its duties with respect to SNF (U-12121, Tr 42); Edison participated in a private SNF storage initiative (*Id.* at 44-45) and Edison continues to actively monitor related industry events (*Id.*, at 45, 49, 67). The Commission was also well aware that Edison joined it as a founding member of the Nuclear Waste Strategy Coalition in 1993. The primary purpose of that organization is to lobby Congress and the DOE to move forward with the nuclear waste disposal program. In connection with this coalition, there have been communications and exchanges of information regarding SNF between Edison and the MPSC. Through the Coalition, representatives from Edison met frequently with MPSC Staff and Commission members to discuss and share information related to SNF issues. These meetings and exchanges of information are reflected in the annual reports of the Coalition, which have been provided to the MPSC. The Commission was entitled to use its "experience, technical competence and specialized knowledge in the evaluation of evidence presented to it" in this case. M.C.L. 24.277. (167a).

SNF disposal. Edison, either directly or through a utility group, cooperated and exchanged SNF information with members of the Commission and other interested parties. There were also several strategic meetings among Edison, other utilities, and the Commission to discuss litigation strategy in those cases.[13]

Edison has, from the beginning, initiated and supported appropriate efforts regarding its SNF costs. These efforts have more than satisfied any objective "reasonable and prudent" standard for cost recovery under Michigan law. Under these circumstances, there is no credible basis on which to further question the reasonableness and prudence of Edison's SNF costs.

III. PETITIONER'S PROPOSED REMEDIES WOULD BE INAPPROPRIATE.

Again, the Court need not reach the following discussion, since Petitioner presents only a preemption question that is not appropriate for review by this Court. There is also no basis to reach Petitioner's proposed "remedies," since Edison did not do anything

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[13] Petitioner did not participate in those cases; however, its present attorney, in his former role as Assistant Attorney General in charge of the Public Service Division for the State of Michigan, participated in meetings of the Nuclear Waste Strategy Coalition, and personally argued *Indiana Michigan Power Co., supra*, and *Northern States Power Co., supra*, on behalf of a large number of the affected parties.

unreasonable or imprudent in the first place. Due to Petitioner's gross mischaracterizations and for the sake of completeness, however, Edison submits that in addition to the Commission and Michigan Court of Appeals being absolutely right, Petitioner's contrary proposals are wrong.

Although Edison shares the frustration of many others regarding the DOE's slow progress in developing a facility for the disposal of SNF, Edison has acted reasonably and prudently under the circumstances. Accordingly, based on Michigan law and the evidentiary record, the Commission appropriately allowed Edison to recover the SNF fee costs from its customers, as explained above. The Commission also appropriately rejected the additional utility financial reporting and other remedies advocated by Petitioner. Such remedies would not accelerate developing a safe, cost-effective and timely federal facility for disposing of SNF. Rather, they would simply penalize Edison for the DOE's delay, without any lawful or reasonable basis for such a penalty. The Commission appropriately found, as it did in Case No. U-12613, *supra*, and as recommended by the ALJ, that MEC/PIGRIM's "proposals are not necessary to correct any showing of an unreasonable or imprudent action or omission on the part of [utility] management . . . and the commission is unable to find that

[the utility] has been imprudent." (U-12613 Order, pp. 8-9, more fully quoted at 43a).[14]

In addition to being unfounded, Petitioner's proposals are also irresponsible and counterproductive. If the DOE repudiates its obligations entirely (which has *not* happened and is completely speculative), then the appropriate protection for electric customers likely would be for Edison to seek relief from the DOE, including refund of all amounts previously paid to the DOE under the Standard Contract, in addition to other potentially-available relief against the DOE. The advisability of such a course of action, its likelihood of success, and the ultimate disposition of any recovery, are of course subject to future facts, law and circumstances, which are unknown and unknowable at this time.[15]

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[14] Petitioner's proposals are also unnecessary because the funds paid to the DOE by Michigan utilities are already protected by the federal government. 42 U.S.C. §10222(c). (68a). The NWPA provides that all fees paid to the DOE by utilities are deposited in the Nuclear Waste Fund. The NWPA may be used only for radioactive waste disposal expenses. 42 U.S.C. §10222(d). (69a). *Alabama Power Co. v. Dep't of Energy*, 307 F.3d 1300, 1312-16 (11th Cir. 2002).

[15] Edison declines to further comment on ongoing litigation, but notes that there is authority supporting the proposition that seeking contract damages (rather than Petitioner's suggestions) should be a utility's first response to the DOE's default on its obligation to take possession of SNF. *Northern States Power v. Dep't of Energy*, 224 F.3d 1361 (Fed. Cir. 2000); *Maine Yankee Atomic Power v. United States*, 225 F.3d 1336 (Fed. Cir. 2000).

(Continued on following page)

The situation is unchanged by Petitioner's accusations that Edison should take drastic action based on speculation that the DOE's delay in establishing a permanent repository at Yucca Mountain is somehow an indication that such a repository will never open. It is undisputed that the opening of such a repository has been delayed, but there is also no credible dispute that Edison's actions are appropriate in light of the situation, and the MPSC properly declined Petitioner's proposals to take action against Edison, since Edison did not do anything wrong in the first place.

Finally, the record demonstrates that the MPSC was correct in finding no merit in Petitioner's witness Callen's recommendation that the Commission establish annual filing and reporting requirements for Edison regarding SNF (Tr 2503). Edison witness

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The United States Court of Appeals for the Federal Circuit also recently explained:

> "Here, Indiana Michigan could not have claimed anticipatory repudiation even if it wanted to; while the government did indicate that it would not meet the 1998 deadline, its actions did not portend an absolute refusal to perform the contract. The NWPA itself, and the Standard Contract's terms drafted pursuant to it, compelled Indiana Michigan to bring an action for partial, not total breach. Had Indiana Michigan brought an action for total breach, DOE would have been discharged from further responsibility under the contract, a situation apparently not desired by appellant and foreclosed by statute." *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1374 (Fed. Cir. 2005).

Colonnello explained that the nuclear utility industry is one of the most highly monitored and regulated industries in the country. The Commission already receives reports every 3 years on Edison's nuclear decommissioning fund, which includes SNF information. Additional information is available to the Commission and its professional Staff on request. Petitioner's proposed filing and reporting requirements would increase costs, without any benefit (Tr 2641).

Thus, in addition to the lack of foundation for the MPSC to disallow Edison's cost recovery under Michigan law and the evidentiary record, Petitioner's proposed remedies lack merit. Consequently, the MPSC and the Michigan Court of Appeals correctly rejected Petitioner's claims on the basis of Michigan law.

CONCLUSION

The Petition is unfounded, and there is no sound basis to grant it. Therefore, Respondent Edison respectfully requests that the Petition be denied.

Respectfully submitted,

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